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No. 267

The Supreme Court of the United States

October Term, 1943

UNITED STATES OF AMERICA, *Petitioner*

v.

SEATTLE-FIRST NATIONAL BANK,
a National Banking Association

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

QUESTION PRESENTED

Does the organization of a national banking association by consolidation under The National Bank Act involve liability for documentary stamp tax under the Internal Revenue Act?

STATEMENT

Respondent, Seattle-First National Bank, is a national banking association organized on December 28, 1935, under Section 34a of The National Bank Act (12 U. S. C. A., § 34a). The constituent banks participating in this consolidation were the Spokane and Eastern Trust Company, of Spokane, Washington (a state bank incorporated under the laws of the State of

Washington), and First National Bank of Seattle (a national banking association organized under The National Bank Act).

The proceedings taken were those required by The National Bank Act, namely; an agreement of consolidation entered into by the directors of the constituent banks participating (R. 25), ratification of this agreement by the stockholders of both banks (R. 38) and the issuance of a certificate of approval by the Comptroller of the Currency (R. 16). No deed, conveyance, assignment or other instrument was executed to transfer to the resulting consolidated association, Seattle-First National Bank, the assets of either of the constituent institutions participating in the consolidation (R. 77-78), The National Bank Act by its terms subjecting the consolidated association to all liabilities of the constituent members and vesting in the consolidated association all assets of the constituent members.

The consolidation agreement (R. 25) was in the form prescribed by the organization division of the Bureau of the Comptroller of the Currency (R. 25), and contained stipulations on the part of both banks as required by Section 34a of The National Bank Act. For example, the agreement of consolidation stipulated for consolidation under the charter of the First National Bank of Seattle, provided for the name of the resulting consolidated association, the location of its main banking house, the amount of its capital, the contribution of assets by each of the constituents to the consolidation, the vesting of these assets in the consolidat-

ed association and the assumption by it of the liabilities of each of the constituents, the allotment of shares and such other matters as The National Bank Act required.

The Collector of Internal Revenue required the payment of documentary stamp tax under Schedules A-3, A-8, A-9, Title VIII of the Revenue Act of 1926, as amended, claiming (R. 19, 21) that as a result of the consolidation the Spokane and Eastern Trust Company was merged into and became a branch of the First National Bank of Seattle (R. 19), as a result of which the assets of the Trust Company became the property "of the continuing corporation, the First National Bank of Seattle" (R. 19). Accordingly, stamps in the amount of the asserted liability were purchased, and there being no conveyance, assignments or other transfers to which stamps might be attached the Deputy Collector affixed them to letters which he wrote to the Spokane and Eastern Branch of the First National Bank of Seattle. Claim for refund having been made and denied this suit was brought to recover the sums paid.

The pleadings consisted of the complaint and the answer of the United States. The court ordered a pretrial conference under Rule 16 of the Rules of Civil Procedure (R. 11) and made findings of fact. At the trial plaintiff introduced evidence of J. L. Campbell, George H. Westerman and C. A. Nicholson, officers of the Bank, and exhibits consisting of the certificate of the Comptroller, minutes of the meetings of the stockholders and directors of the Spokane and Eastern

Trust Company and letters from the Deputy Collector of Internal Revenue with the stamps for the amount of the tax assessed affixed and cancelled by him. The United States offered no testimony (R. 54).

The opinion of the court (R. 55) contains the following factual finding:

> "* * * As a consequence of the consolidation, without the issuance of any deed or other instrument of conveyance as to the real estate and without the execution of any instrument of transfer as to the stocks and bonds and other securities, the title to all of such property became vested in the plaintiff.* * *"

The court concluded that as to the stocks and bonds the reasoning employed by the United States Circuit Court of Appeals for the Ninth Circuit in *United States* v. *Merchants National Trust & Savings Bank*, 101 Fed. (2) 399, applied (R. 71). Secondly, the court concluded that as to the real estate there had been no sale, no conveyance, "no purchaser to whom any lands, tenements or realty were granted, assigned, transferred or otherwise conveyed to or vested in" (R. 72), and accordingly concluded that as to each category the tax had been improperly assessed (R. 75). Findings of fact (R. 76) and judgment (R. 82) were entered in accordance with the court's opinion.

Upon appeal to the United States Circuit Court of Appeals the United States omitted from its designation of the portions of the record the evidence introduced at the trial (R. 85). Accordingly, there is before this court a partial record only. The testimony of the

officers of the Bank introduced by the plaintiff is omitted (R. 54).[1]

ARGUMENT

I. The National Bank Act.

In this case no question of fact is presented for review. The plaintiff did that which the Bank Act prescribed, nothing more. The effect of such a consolidation depends upon a construction of The National Bank Act, its purpose and effect.

The National Bank Act is to be construed by the same principles as any other act of Congress. The comprehensive terms of no act of Congress ought to be restricted by technical refinements or by specious reasoning. Statutes ought to be construed in the light of their purpose. Where that purpose is unmistakable, it should be given effect. They are to be given a reasonable application consistent with their words and with the legislative purpose. *Haggar Co.* v. *Helvering*, 308 U. S. 389, 394.

The conflict between the theory embodied in the state

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[1] An examination of the opinion of the court (R. 55), the findings of fact numbers 5 and 6 (R. 77), will disclose that the court had before it evidence that, as stated by the Circuit Court of Appeals, "no deed, assignment or other instrument was executed to transfer real estate, stocks, bonds, or other property whether held in a fiduciary capacity or owned outright by the bank. The certificates were not endorsed, nor was there any delivery or change of possession other than that which may be implied from the consolidation" (R. 94). We suggest, accordingly that under the universally accepted rule of appellate practice this court will presume that proper evidence to sustain the finding of fact was introduced at the trial. *United States* v. *Winston*, 170 U. S. 522, 525.

bank system and the national banking system has long been familiar to everyone.[2] In the process of time it has become the established policy of Congress to encourage the conversion of state banks into national banking associations. The tragedy of the last depression and bank holiday has strengthened this congressional purpose and gone far to reduce the opposition on the part of the states and state banks. Opposition remains, however.[3]

The present statute (Title 12, U. S. C. A.) is derived from the Act of June 3, 1864. Under the act national banking associations may be formed in one of four ways:

First. An association may be formed under §§ 21 to 28, inclusive of The National Bank Act. The formalities required are that the persons uniting to form the association shall sign articles of association (§ 21, Title 12, U. S. C. A.), and shall execute an organization certificate (§ 22, Title 12, U. S. C. A.), which shall be acknowledged and filed with the Comptroller of the Currency (§ 23, Title 12, U. S. C. A.). Thereupon the Comptroller issues his certificate of authority to com-

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[2]The names of Hamilton, Jefferson, Jackson and Webster and the cases of *McCulloch* v. *Maryland*, 4 Wheat. 315; *First National Bank* v. *Fellows*, 244 U. S. 416; and *Ex parte Worcester Nat'l Bank*, 297 U. S. 347, instantly remind everyone of the wealth of eloquence which has been devoted to the subject in the legislatures, state and national, as well as in the courts.

[3]*Hofheimer* v. *Seaboard Citizens Nat'l Bank*, 154 Va. 392, 153 S. E. 656. See also Congressional Record, Vol. 77, Part 4, p. 3227 et seq., Senators Glass, Costigan and Cousins; p. 3827, Congressmen Steagall and May; and p. 3840, Congressman Patman.

mence banking (§ 27, Title 12, U. S. C. A.).

Second. Under Section 35 a state bank may be converted into a national banking association (§ 35, Title 12, U. S. C. A.). The formalities of organization, in brief, are the affirmative vote of the stockholders to the conversion, execution of articles of association and an organization certificate by the directors and approval by the Comptroller of the Currency.

Third. The Act of November 7, 1918 (§ 33, Title 12, U. S. C. A.), authorizes the consolidation of two or more national banking associations into one association. The required procedure, affirmative vote of shareholders, execution of agreement by directors and approval by the Comptroller does not differ materially from that required for the formation of an association by conversion under Section 35.

Fourth. The Act of February 25, 1927 (§ 34a, Title 12, U. S. C. A.), amended the Act of November 7, 1918, by adding a third section authorizing the consolidation of a state bank with a national banking association. The required procedure, affirmative vote of shareholders, execution of agreement by direct vote of shareholders, execution of agreement by directors and approval by the Comptroller is identical with that required under Section 33.

It thus appears that national banks may be formed under four different acts of Congress and that in each case the procedure is substantially the same. Likewise state banks may be converted into national banking associations under two separate acts of Congress which have now been included in The National Bank Act as

paragraphs 35 and 34a. Also, since 1864 it has been the congressional policy to encourage the organization of national banking associations out of state banks.

Of course, it is apparent that the effect of the destruction of its corporate existence and identity and the interruption of its banking business would be such as to discourage any state bank from changing over into a national banking association by conversion or by consolidation unless provision was made for continuity of corporate existence, banking operations, property rights and liabilities.[4] The necessity for continuity of corporate existence has been recognized by this court in cases of the conversion of a state bank into a national banking association. *Metropolitan Nat'l Bank* v. *Claggett*, 141 U. S. 520.

Through some oversight the Act of November 7, 1918, providing for the consolidation of national banking associations (§§ 33 and 34, Title 12 U. S. C. A.)

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[4]The business of banking is complicated. Practically no individual remains unaffected by even the momentary suspension of their operations. The bank holiday is an example. A large city bank has many millions of deposits. Its saving deposits are evidenced by savings bank books, constituting a contract between the bank and the depositor. It has outstanding negotiable instruments of various kinds, notes, letters of credit, certificates of deposit and in times past currency. If it is authorized to do a trust business it is presumably acting as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics and in many other fiduciary capacities. If it were necessary for the state bank to resign as trusteee, executor, administrator, guardian, etc., file its accounts with the court having jurisdiction with the attendant publication of notice, hearing, etc., it would be a task beyond undertaking. At the same time the national banking association would have to be reappointed after the formal application, notice, hearing, etc., and qualify according to the requirements of different jurisdictions.

incorporated language which might give rise to the contention that the effect of the consolidation was an absorption by one bank of the others so that the corporate existence of only the one bank continued in the resultant consolidated association.

To correct this oversight the Act of February 25, 1927, § 34a, enacted to provide for the consolidation of a state bank with a national banking association, contained the following language:

> "Upon such a consolidation, or upon a consolidation of two or more national banking associations under section 33 of this title, the corporate existence of *each* of the constituent banks and national banking associations participating in such consolidation shall be merged into and continued in the consolidated national banking association and the consolidated association shall be deemed to be the same corporation as each of the constituent institutions." (Italics ours)

It likewise provided for the continuity of corporate titles in language to be quoted later.

It is not important whether formation of national banks by what the Bank Act describes as consolidations is in fact a consolidation or a merger of those words are employed in state statutes. Whether the formation of a national banking association is similar to a consolidation or similar to a merger has no bearing upon the question before this court—for what purpose did Congress insert the language employed in prescribing the effect of the formation of a banking association by a consolidation.

The policy of Congress has long been to foster the progressive strengthening of the banking structure of the country by consolidations, and to encouraging the growth of the national banking system through the gradual absorption of state banks; and to simplify the cumbersome procedure incident to the consolidation or merger of corporations under state statutes by limiting the number of documents and steps and formalities required.

In the face of this plain purpose the court is asked to say that Congress intended to eliminate only *some* of the formalities, documents and steps incident to the normal transfer of legal title to property but not all. Documentary stamp taxes are not the least of the formalities incident to the transfer of property. It is to be remembered that most of the states have excise tax laws similar to the documentary stamp tax laws of the Internal Revenue Act. Presumably, also, the various municipal and quasi-municipal entities within a state having power to levy excise taxes would gladly impose them upon one of the giant national banking associations formed by consolidation if that involves taxable incidents.

We suggest that some confusion is occasioned by the failure to keep distinct the entities involved in the consolidation in this case. The agreement of consolidation was made between the Spokane and Eastern Trust Company of Spokane, Washington, a bank organized

under the laws of the State of Washington, and the First National Bank of Seattle, a national banking association formed under The National Bank Act. Respondent here, Seattle-First National Bank, a national banking association was organized on December 28, 1935, by consolidation of the two foregoing entities. Of course, the Spokane and Eastern Trust Company had stockholders, officers and directors, as did the First National Bank of Seattle, and so has the respondent, Seattle-First National Bank.

At no time were the assets of the Spokane and Eastern Trust Company or the First National Bank of Seattle vested in their respective stockholders. They (stockholders) did not own them and could not convey them. If it could be said that the stockholders of the two banks owned the assets and could convey legal title to them, to whom is it claimed that they conveyed them? At page 10 and page 19 of the Government's brief it is claimed apparently that the agreement of consolidation was a conveyance by the stockholders of the Spokane and Eastern Trust Company to respondent. It is even stated at page 10 that the agreement of consolidation effected a transfer of title to the securities held by the state bank as a fiduciary. Why is it permissible to disregard the corporate entity of the two constituent banks and claim that their assets are owned by their stockholders and yet insist upon the corporate entity of the resulting consolidated association. If we disregard the corporate entity all around, since the shareholders are the same, the

Government is in the position of claiming that the stockholders of the Spokane and Eastern Trust Company and the First National Bank of Seattle have sold and transferred to themselves as stockholders of the Seattle-First National Bank the same assets. As pointed out at page 19 of the Government's brief they have been paid full value for these assets, yet they still own them. A remarkable feat of financial legerdemain.

Nor can we refrain from noting that at page 10 of the Government's brief it is claimed that the consolidation agreement is a transfer of legal title to securities held by Spokane and Eastern Trust Company in its various fiduciary capacities. For instance, the Spokane and Eastern Trust Company, let us say, was executor under the will of John Jones, deceased, and as such held legal title to certain bonds. As a result of the consolidation the Seattle-First National Bank is now the executor under the will of John Jones, deceased, and holds the legal title to these same bonds. Is it the Government's position that the stockholders of the Spokane and Eastern Trust Company by the consolidation agreement sold or conveyed the legal title to these bonds?

Of course, national banks do purchase the assets of other banks, either state or national, and pay for them. See, for example, *Dixon* v. *Cannon*, 32 Fed. Sup. 626; 115 F. (2) 913.

Likewise, national banks on occasion pledge their assets or loan money upon the security of a pledge of

another bank's assets. *Hightower* v. *American Nat'l Bank*, 263 U. S. 351.

Likewise, national banks enter upon other plans for the acquisition or disposition of assets. *Adams* v. *Nagle*, 303 U. S. 532.

None of these or similar transactions are a consolidation as prescribed by The National Bank Act. The Seattle-First National Bank, a national banking association, was formed by consolidation under Section 34a of The National Bank Act. It did not buy its assets from the Spokane and Eastern Trust Company, or its stockholders, nor from the First National Bank of Seattle, or its stockholders, nor from any combination of the four.

II. Documentary Stamp Taxes Under the Revenue Act of 1926, As Amended.

The present act is identical in language with previous acts, except that Congress from time to time has added or eliminated from the subjects enumerated in Schedule A. It is noteworthy, however, that when sales or transfers of stock, sales or transfers of bonds and deeds of conveyance of land have been added or eliminated from Schedule A, the language employed has been the same as that in previous acts.

The language of Section 800 is "* * * there shall be levied, * * * in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters and things mentioned in Schedule A of this title, * * *" In other

words, the Act levies an excise tax on certain named and described things or transactions.

Turning to Schedule A-3, the thing or transaction upon which the excise tax is levied is "Capital Stock, Sales or Transfers." A-8. "Conveyances." A-9. "Bonds, etc., Sales or Transfers." Under 3 the excise is on a *sale* or *transfer* of *legal title;* under 9 upon *sales* or *transfers* of *legal title* * * * (bonds, etc.); under 8 upon conveyances (deed, etc.) by which land which has been sold is conveyed. In all three cases a sale is required and in all three a transfer of legal title is required. In one, namely, 8, the levy is upon the instrument, not upon the sale and not upon the land. There must be a sale, transfer or delivery of legal title from one person or entity to another before the tax attaches.

In *Reybestos-Manhattan Co.* v. *U. S.*, 296 U. S. 60, 62, this court had occasion to consider this excise tax. The court held that the transfer of the right to receive shares was equivalent to the transfer of the shares themselves. Speaking of the Act the court said:

> "* * * Its language discloses the general purpose to tax every transaction whereby the right to be or become a shareholder of a corporation or to receive any certificate of any interest in its property is surrendered by one and vested in another * * *."

and again:

> "* * * It is enough if the right or interest transferred is, by any form of procedure, relinquished by one and vested in another * * *"

and further (p. 63):

"* * * It is relinquishment of the ownership for the benefit of another, and the resultant acquisition of it by him which calls the statute into operation."

In the language of the Bank Act respondent is "deemed to be the same corporation" as the Spokane and Eastern Trust Company whose corporate existence is "continued in" respondent. The Spokane and Eastern Trust Company has not sold or parted with ownership. On the contrary, it has retained it. It has remained the same body corporate with the same stockholders, the same officers, banking quarters, assets and liabilities, but has assumed a new name and operates under a changed jurisdiction. There has been "no relinquishment of the ownership" by the Spokane and Eastern Trust Company "for the benefit of" the respondent. Nor has there been "the resultant acquisition of it" by respondent "which calls the statute into operation."

III. Regulations 71, Relating to Stamp Taxes Under Title VIII of the Revenue Act of 1926, as Amended.

The Commissioner of Internal Revenue has promulgated regulations for the enforcement of Title VIII of the Revenue Act. We will refer to several articles in these regulations. It will be convenient, however, to segregate consideration of the regulations into two parts, the first being those prescribed under Schedules A-3 and A-9 for the sales and transfers of stocks and bonds (the regulations covering such transactions being identical), the second being those prescribed for

the conveyance of real estate under Schedule A-8.

First. The applicable regulations are:

Chapter III of Regulations 71 (revised July 1932). The regulations follow the language of the statute by using the words "Sales and Transfers" as the subject matter with which the regulations deal. They do not purport to deal with matters which are neither sales nor transfers unless some similarity of form or substance requires a particular transaction to be specially considered. Thus, Article 31, "Basis of Tax," commences as follows: "Sales or transfers of stock." Article 34. "Sales or transfers subject to the tax." Article 35. "Sales or transfers not subject to tax." Article 36. "Memoranda of sales." Article 37. "Records of sales or transfers of stock." Article 38. "Returns by persons making sales." The Collector of Internal Revenue did not attempt by the regulations to extend the scope of the Act to transactions beyond the language of the Act.

The regulations attempt definition of the scope of the Act by illustration. The examples given do not purport to be all inclusive. They do not exclude other transactions. On the contrary, it is implied that similar transactions to those given as examples would in like manner be included or excluded.[5] Thus, Article

[5] In *State Bank Farmers Trust Company* v. *Hoey*, 125 Fed. (2), 575, the court failed to notice the fact that the 1932 edition of Regulations 71 attempts to define the scope of the Act by giving examples, thus clearly indicating that it was intended that other transactions of a like kind would be treated in the same manner.

34 gives *examples* of transactions subject to the tax and Article 35 gives *examples* of transactions not subject to the tax. Subparagraph (m) of Article 35 gives as an example the mere delivery of a certificate by or on behalf of a customer to his broker for the purpose of sale. Art. 35 (n) gives as another example the mere delivery of a certificate of stock from a broker to his customer. Certificates of the fact and other formalities are required. Delivery by the customer to his messenger for delivery to the broker would not be a taxable sale or transfer, even though not given as an example in the regulations. Also a delivery to one's secretary, cashier, or office manager, would not be subject to tax, even though not mentioned as examples in the regulations. In short, to say that the regulations were intended to be or are an all inclusive definition of transactions subject or not subject to the tax leads to an immediate absurdity.

Art. 35 of the Regulations:

> "Article 35. Sales or transfers not subject to tax.—The following are examples of transactions not subject to the tax * * *
>
> "(r) Transfers of shares or certificates of stock which result wholly by operation of law are not subject to the tax. Transfers of this character are those which the law itself will effect without any voluntary act of the parties, such as transfer of stock from decedent to executor."

Even though it should be held that a consolidation necessarily involves a sale and a transfer of the stocks and bonds of the constituent banks to the resulting consolidated association, it is a transfer solely by opera-

tion of law. It is scarcely possible to conceive of a more perfect example of a transfer by operation of law than that given by the Bank Act.

> "* * * All the rights, franchises and interests of each of such constituent banks * * * in and to every species of property, * * * shall be deemed to be transferred to and vested in such consolidated national banking association without any deed or other transfer; * * *".
>
> "* * * and such consolidated national banking association, by virtue of such consolidation and without any order or other action on the part of any court or otherwise, shall hold and enjoy the same and all rights of property, franchises and interests, * * *"

We note the argument that the consolidation agreement was executed by the directors of the constituent banks participating in the consolidation and that this was required by the Bank Act and that, therefore, Section 34a of the National Bank Act requires the affirmative act of the directors and stockholders of each of the constituent institutions and therefore the transfer is not wholly by operation of law. The argument might also have included the fact that the Bank Act requires the affirmative act of the Comptroller of the Currency. No one step in a consolidation would affect a transfer of assets. *Adams* v. *Nagle*, 303 U. S. 532. The consolidation agreement, when executed by the officers and directors of the constituent banks, did not transfer assets even when ratified by the stockholders. Every act which either of the constituent banks, their officers, directors and stockholders, could or did do would be wholly insufficient to create the

Seattle-First National Bank or vest the assets of either of the constituent banks in it. *Adams* v. *Nagle*, 303 U. S. 532.

Obviously, a consolidation is one thing; transfer (if it be a transfer) of assets pursuant to it is another and a different thing. Just as death, marriage, divorce, insolvency, etc., are one thing and the devolution of property pursuant thereto another. Marriage, divorce or insolvency require affirmative acts of the parties. They may or may not have as their result a transfer of legal title to property but that transfer is not by the affirmative act of the parties but is wholly by operation of law. The assets of the constituent banks participating in a consolidation vest in the resulting national banking association, but they vest pursuant to the consolidation, in the language of the Bank Act, "by virtue of such consolidation."

We turn to Article 35 (h):

> "Article 35. Sales or transfers not subject to tax.—The following are examples of transactions not subject to tax: * * *
>
> "(h) The transfer of stock from the name of a deceased or resigned trustee to the name of a substituted trustee appointed in accordance with the terms of the original trust agreement, which is a transfer resulting wholly by operation of law."

This article is applicable to the stocks and bonds held in fiduciary capacities by the Spokane and Eastern Trust Company.

A trust is an entity in and of itself. It is not destroyed, changed nor its efficacy in anywise impaired

by a change in the person who is trustee. If a trustee dies, resigns, or is removed because of incapacity or other reasons, the trust has not thereby failed. It is submitted that if the trust as an entity sells and conveys bonds to another trust or to another entity, then there is, in the language of this Court "a relinquishment of the ownership" by one entity for "the benefit of another" entity and there is "the resultant acquisition" of that ownership by the second entity. But when a trustee dies, resigns or is otherwise removed from his office and a new trustee is appointed, then there has been no relinquishment of ownership of the assets of the trust by the trust for the benefit of any other entity and no resultant acquisition of the ownership of the assets by any other entity. In the words of the statute and of the regulations, there has not been a sale nor a transfer.

The regulations recognize this. Congress also recognized the point in the Revenue Act of 1942, c. 619, 56 Stat. 957.

We note the fact that in two cases, *City Bank Farmers Trust Co.* v. *Hoey*, 125 Fed. (2d) 577), and *State Street Trust Company* v. *Hassett*, 134 Fed. (2d) 156, it has been held that assets held in trust by one of the parties to a statutory merger under the Massachusetts or New York statutes pass by a transfer which is not within the scope of Article 35 (h). However, it is respectfully submitted that these decisions overlook the legal attributes of a trust and the relation of a trustee to it, and in attempting to disregard the tech-

nical legal relationships of a trustee to the trust and its assets and beneficiaries have misapplied the decision of this court in *Raybestos-Manhattan Co.* v. *U. S.*, 296 U. S. 60.

Whether or not we are correct in this criticism of these decisions, and whether or not there were in fact actual taxable transfers in each of these cases, and whether or not apart from the mere fact of entering into a merger there were strictly technical transfers of trust assets by assignment of stocks, surrender and re-issue of new certificates as suggested in our brief in opposition to certiorari, none the less these cases cannot be applied to a consolidation under The National Bank Act, where

> "* * * such consolidated national banking association, by virtue of such consolidation and without any order or other action on the part of any court or otherwise, shall hold and enjoy the same * * * appointments, * * * as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any such constituent institution at the time of such consolidation."

Second. Real Estate.

The language of Schedule A-8, abbreviated, follows:

> "8. Conveyances: Deed, instrument, or writing, delivered * * *, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to or vested in, the purchaser or purchasers * * *"

A levy under this Schedule is upon a conveyance but not upon all conveyances. The levy is upon only those conveyances whereby lands are granted. It is further limited to conveyances granting lands which have been sold; and further limited to conveyances which vest title in the purchaser. Under the terms of the Act, then, there must be a deed, which is a technical instrument of conveyance effective under state law to convey land which has been sold to the purchaser.

The regulations interpreting this Schedule emphasize this interpretation. The regulations are contained in Chapter 8 of Regulations 71 (1932 ed.) commencing at page 38. The regulations are too numerous to be set out in full and we have accordingly printed them in an appendix. In general they contemplate a grantor and a grantee; a technical deed; a technical sale; a valuable consideration; and a technical vesting of title.[6]

As noted previously the Internal Revenue statutes have contained a provision for a documentary stamp tax for many years. The documentary stamp tax on conveyances was included in the War Revenue Act of 1917 (Act of October 3, 1917; 40 Stat. 319) as Schedule A-7. The same language was included in the Revenue Act of 1918 (Act of February 24, 1919; 40 Stat. 1057) as Schedule A-7. The present Act is in language identical.

The regulations applicable to conveyances of real

[6]See Articles 75, 79, 84, 91, 92, 100, 101, 102, 103, 105, 106, 111 and 113.

estate have likewise been promulgated for a long time. Regulations 55, as revised October 1920; Regulations 55, as revised July 3, 1924, etc., are for present purposes identical with Regulations 71, as revised July 1932. It is suggested that the enactment, re-enactment and final codification of the statute while the regulations were in effect should be treated as approving their interpretation of the scope of the statute. *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 100; *Helvering* v. *Reynolds Tobacco Co.*, 306 U. S. 110, 115; and *National Lead Co.* v. *U. S.*, 252 U. S. 140.

We turn to the situation in this case. No deed or any other instrument of conveyance has been executed by any one.[7] The directors of the Spokane and Eastern Trust Company of Spokane and The First National Bank of Seattle signed an agreement for consolidation and the stockholders ratified it. The Government's position is that such an instrument may be construed to be a conveyance. It does not purport to be a conveyance. It is merely an agreement to consolidate in the future. It is not self-executing; it does not operate to transfer title. The consolidation agreement was an agreement to consolidate, nothing else. In the statutory words it was not a "deed," it was not "delivered," it did not "grant."

For the sake of the argument, however, let us con-

[7]The banking quarters occupied by the Spokane and Eastern Trust Company are now occupied by the Seattle-First National Bank. No deed or other instrument of conveyance has been executed or delivered. The Collector of Internal Revenue affixed the stamps to a letter which he wrote. (R. 19).

sider the consolidation agreement to be a deed. The parties to it are the Spokane and Eastern Trust Company of Spokane and the First National Bank of Seattle. Presumably, then, the Spokane and Eastern Trust Company, a corporation, is the grantor, and the First National Bank of Seattle, a national banking association, is the grantee. Presumably, also, the instrument in and of itself operates when delivered to divest the grantor of title to real property and vests it in the grantee. The difficulty with this is that the title to the banking quarters never vested in the First National Bank of Seattle. Under the terms of the Bank Act the title is not transferred from one constituent to the consolidation to another constituent but vests in the resultant consolidated association, namely, the Seattle-First National Bank.

A second difficulty is that the title now vested in the Seattle-First National Bank did not vest in it by means of the consolidation agreement (only one step in the consolidation) but by virtue of the consolidation as a whole and the operation thereon of the terms of The National Bank Act.

But it is said that the banking quarters were sold to a purchaser upon a valuable consideration because stock in a corporation is a valuable consideration. We have already remarked upon the confusion resulting from such an argument. The legal title to the banking quarters of the Spokane and Eastern Trust Company was never in the stockholders of that institution. It was in the corporation. How, then, could the stock-

holders sell it, and to whom did they sell it, and for what price? The answer is that they did not. The corporation of which they were stockholders changed its name and the jurisdiction to which it was subject, becoming a national bank. If this be a sale, so is conversion of a state bank into a national bank and so is every change of name.

There was an absence of every element necessary to the levy of an excise tax under Schedule A-8—deed, sale, grantor, grantee, transfer, consideration.

The case of *Carpenter* v. *White*, 80 Fed. (2) 145, is cited as applicable. It involved a transfer of real estate by deeds of two corporations in a non-statutory merger. There having been deeds of conveyance the only question was whether there was a consideration. This is too remote to be of any value.

IV. Cases Cited.

We have discussed in the course of this brief such of the cases cited in the Government's brief as seem to have some bearing upon the question considered. There are one or two cases, however, that have not been touched upon.

The case of *Koppers Coal & Transportation Co.* v. *United States*, 107 Fed. (2) 706, was a merger under the laws of Delaware, which contained no provision for the automatic transfer of property. Accordingly, one of the constituents to the merger endorsed and delivered to the transfer agent stock which it held as an

asset for registration in the name of the resultant corporation.

The cases of *State Street Trust Co.* v. *Hassett*, 134 Fed. (2) 156, and *City Bank Farmers Trust Co.* v. *Hoey*, 125 Fed. (2) 577, have been discussed in the preceding pages and in our brief opposing granting of certiorari in this case. We there pointed out that neither of these cases touch upon the question of a conveyance of real estate under Schedule A-8 nor upon the question of a sale or transfer of owned assets.

We have not discussed the case of *United States* v. *Merchants Nat'l Trust & Savings Bank*, 101 Fed. (2) 399, nor the opinions of the District Court or the Circuit Court of Appeals in the present case. They speak for themselves. Respectfully we submit that the reasoning of the Circuit Court of Appeals for the Ninth Circuit construing the statute in the light of Article 35 (h) of Regulations 71 and Article 35 (r) of the same regulations is correct.

V. Conclusion.

It is respectfully submitted that this case has been rightly decided by the courts below and accordingly should be affirmed.

Respectfully submitted,

B. H. KIZER
ARNOLD L. GRAVES
PAUL H. GRAVES
Attorneys for Respondent.

TREASURY REGULATIONS 71

(1932 ed.)

DEEDS OF CONVEYANCE

ART. 75. *Who shall affix stamps.*—The Act requires that the person who makes, signs, or issues any instrument taxable thereunder shall affix and cancel the revenue stamps. It also prohibits any person from accepting such instruments unless they are properly stamped.

ART. 79. *"Sold" defined.*—The term "sold" imports the transfer of the absolute or general title for a valuable consideration or price.

ART. 84. *What constitutes real property determinable by law of State where located.*—(a) What constitutes "lands, tenements, or other realty" is determinable by the law of the State in which the property is situated. Standing timber is ordinarily held to be real estate, and where so held the deed transferring it is subject to the tax.

(b) In States where common-law dower still exists an instrument purporting to convey the inchoate right of dower of a wife or the consummate right of dower of a widow, prior to assignment of dower, is not subject to stamp tax; but an instrument conveying the estate acquired by a widow upon assignment of dower is subject to tax. Where by statute dower has been abolished and a different interest in the husband's real property conferred upon the wife in lieu thereof, the taxability of an instrument purporting to convey such an interest prior to its assignment will be determined by the nature of the wife's interest, and the statutes and decisions of the particular State in which the real estate is located must be consulted.

ART. 91. *Options and contracts for real estate.*—No tax is imposed upon an option for the purchase of real property or upon a contract for the sale of real estate.

ART. 92. *Deeds of release and deeds of trust.*—Deeds of release and deeds of trust are not subject to tax.

ART. 100. *Deeds from agent to principal.* — Deeds from an agent to his principal conveying real estate purchased for and with funds of the principal are not taxable.

ART. 101. *Reconveyances of partnership by receivers.*—Conveyances of property of a copartnership, in the hands of receivers, back to the owners after administration of the estate are not taxable.

ART. 102. *Partition deeds.*—Partition deeds are not subject to tax unless a consideration passes between the parties by reason of one or more of them taking under the division a share of real estate of greater value than his undivided interest, in which event stamp tax attaches to the deeds conveying such greater shares, calculated upon the value of such consideration.

ART. 103. *Conveyances without consideration.*—Conveyances of realty, not in connection with a sale, to trustees or other persons without consideration are not taxable.

ART. 105. *Deeds confirming title.*—Deeds that are simply confirmatory and do not vest title not already vested are exempt from tax.

ART. 106. *Contracts for sale of real property.*—Contracts for the sale of real property are not taxable unless they vest title.

ART. 111. *Conveyance by corporation to owner of all the capital stock.*—A conveyance of real estate by a corporation without valuable consideration to an owner of all its capital stock in consequence of its dissolution is not subject to tax.

ART. 113. *Conveyances to trustee, or from trustee to cestui que trust, without consideration.*—Conveyances to a trustee without valuable consideration or from a trustee to a cestui que trust without valuable consideration are not subject to tax.

SUPREME COURT OF THE UNITED STATES.

No. 267.—October Term, 1943.

United States of America, Petitioner, *vs.* Seattle-First National Bank, a National Banking Association.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[March 27, 1944.]

Mr. Justice Murphy delivered the opinion of the Court.

Respondent initiated this suit to recover the amount of the documentary stamp tax, penalty and interest which had been exacted under the Revenue Act of 1926, as amended, in connection with a statutory consolidation of banks under Section 3 of the National Banking Act.[1] The District Court entered judgment for respondent for the amount of the tax and interest, 44 F. Supp. 603.[2] The Circuit Court of Appeals held that the case was governed by one of its former decisions[3] and affirmed the judgment, 136 F. 2d 676. We granted certiorari, 320 U. S. 723, because this judgment was alleged to conflict with decisions in other circuits[4] and because of the desirability of a final settlement of the problems involved.

In 1935 the directors of the Spokane and Eastern Trust Company, a state bank, entered into a written agreement of consolidation with the directors of the First National Bank of Seattle. The agreement provided that the banks were to be consolidated under the charter of the First National Bank of Seattle and under the new corporate title of Seattle-First National Bank, the respondent herein. The agreement was ratified and confirmed by

[1] Act of November 7, 1918, c. 209, 40 Stat. 1043, Sec. 3, as added by the Act of February 25, 1927, c. 191, 44 Stat. 1224, Sec. 1, and as amended by the Banking Act of 1933, c. 89, 48 Stat. 162, Sec. 24, and the Banking Act of 1935, c. 614, 49 Stat. 684, Sec. 331; 12 U. S. C. § 34a.

[2] Recovery was denied for the $100 penalty, which was paid in compromise of a threatened criminal prosecution, on the ground that the compromise was a final settlement of the penalty. This matter is not now before us.

[3] United States v. Merchants National Trust & Savings Bank, 101 F. 2d 399.

[4] See City Bank Farmers Trust Co. v. Hoey, 125 F. 2d 577; State Street Trust Co. v. Hassett, 134 F. 2d 156.

the requisite number of stockholders of both banks and the Comptroller of the Currency issued the necessary certificate of approval, reciting that the directors and shareholders of both banks had complied with the provisions of the National Banking Act.

The state bank owned real estate, including its banking premises, as well as corporate stocks and bonds, to all of which it held legal and beneficial title as part of its corporate assets. It also held in trust certain stocks and bonds, the legal title to which was vested in it as trustee, executor, administrator, guardian, or in other fiduciary capacities. Section 5 of the consolidation agreement provided that "All assets of each association at the date of consolidation shall pass to and vest in the consolidated association, and the consolidated association shall be responsible for all of the liabilities of every kind and description of each of the consolidating associations."

The transfer to respondent of title to this property held by the state bank was not evidenced by any deed, conveyance, assignment or other instrument. Nor were any documentary stamps purchased or affixed with respect to such transfer. Subsequently, a deputy collector examined the bank records and exacted a tax from respondent on the theory that the consolidation had resulted in a taxable transfer. The necessary stamps were purchased and affixed and this suit for refund followed.

First. We conclude that, as to the securities to which the state bank held both legal and beneficial title, there was no taxable transfer under the stamp tax provisions in effect at the time the consolidation took place.

Section 800, Schedule A-3, of the Revenue Act of 1926, as amended,[5] imposes a stamp tax on transfers of legal title to any shares of stock or certificates, "whether made upon or shown by the books of the corporation or other organization, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale (whether entitling the holder in any manner to the benefit of such share, certificate . . . or not)." Schedule A-9[6] imposes a

[5] C. 27, 44 Stat. 9, as amended by Section 723(a) of the Revenue Act of 1932, c. 209, 47 Stat. 169.

[6] C. 27, 44 Stat. 9, as added by Section 724(a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, and as amended by Section 212 of the National Industrial Recovery Act, c. 90, 48 Stat. 195, and as amended by Pub. Res. No. 36, c. 333, 49 Stat. 431.

stamp tax on similar transfers of legal title to bonds.

Standing alone, these statutory provisions make no exceptions and clearly impose a tax on the transfer of title to the securities legally and beneficially owned by the state bank. But administrative regulations, which until recently have been left undisturbed by subsequently enacted legislation and are to be respected as settled administrative practice,[7] have carved out certain exemptions germane to the transfer here involved. Thus Article 34(r) of Treasury Regulations 71 (1932 ed.) provides that the transfer of stock owned by a corporation which is merged into another corporation is subject to the stamp tax, "such a transfer being effected by the act of the parties and not wholly by operation of law."[8] Article 56(r) specifically exempts from the tax those transfers of shares or certificates of stock "which result wholly by operation of law"; it further states that "transfers of this character are those which the law itself will effect without any voluntary act of the parties, such as transfer of stock from decedent to executor." Article 120 makes these same provisions applicable to sales or transfers of bonds. The problem thus resolves itself into a determination of whether the transfer of the state bank's securities to respondent occurred "wholly by operation of law" so as to exempt the transfer from the stamp tax requirements.

It is clear that the consolidation or merger of the national bank and the state bank occurred through the voluntary acts of the respective directors and stockholders pursuant to the provisions of Section 3 of the National Banking Act, with the approval of the Comptroller of the Currency. If the words "wholly by operation of law," as used in the administrative regulations, refer here to the entire process of consolidation, of which the transfer of securities is an essential part, the exemption cannot be applied. But in a broad sense, few if any transfers ever take place "wholly by operation of law" for every transfer must necessarily be a part of a chain of human events, rarely if ever other than voluntary

[7] Substantially similar regulations were promulgated under the Revenue Act of 1926 and were in effect when Congress, in the Revenue Act of 1932, reenacted the stamp tax provisions in issue. Congress did not see fit to amend or change these regulations until the Revenue Act of 1942, Sections 506(b)(1) and (2), c. 619, 56 Stat. 958. See Helvering v. Reynolds Tobacco Co., 306 U. S. 110, 115.

[8] While the grammatical construction of the quoted clause gives rise to some doubt as to its meaning, we interpret it in accord with Article 35(r) so as to impose a tax on transfers arising out of mergers only if the transfer occurs by the act of the parties and not wholly by operation of law.

in character. Thus to give any real substance to the exemption, we must take a more narrow view and examine the transfer apart from its general background. We must look only to the immediate mechanism by which the transfer is made effective. If that mechanism is entirely statutory, effecting an automatic transfer without any voluntary action by the parties, then the transfer may truly be said to be "wholly by operation of law."

Here the actual transfer to respondent of the legal and beneficial title to the securities owned by the state bank was not effected by or dependent on any of the voluntary acts relating to the consolidation agreement or the ratification or approval thereof. Nor was any voluntary deed, conveyance, assignment or other instrument utilized. Rather the transfer occurred solely and automatically by virtue of Section 3 of the National Banking Act. This provides in pertinent part that: (1) upon consolidation, the corporate existence of each of the constituent banks shall be merged and continued in the consolidated national banking association, which shall be deemed to be the same corporation as the constituent banks; (2) all the rights, franchises and interests of each constituent bank in and to every species of property, real, personal and mixed, and choses in action thereto belonging, "shall be deemed to be transferred to and vested in" the consolidated association without any deed or other transfer; (3) the consolidated association, by virtue of such consolidation and without any order or other action by any court or otherwise, shall hold and enjoy the same and all rights of property, franchises and interests (including fiduciary interests) in the same manner and to the same extent as held and enjoyed by the constituent banks.

Thus it is the National Banking Act that is the mechanism by which the transfer of securities is made effective. No voluntary act by the parties is necessary. It follows that the transfer occurred "wholly by operation of law." The mere fact that the parties here saw fit to include in their consolidation agreement a provision that all assets of each constituent bank "shall pass to and vest in the consolidated association" does not make the transfer any less than one "wholly by operation of law." This was merely an agreement that the assets would be transferred in the future and did not purport to be a present, effective conveyance. The transfer of the securities to which the state bank held legal

and beneficial title was therefore exempt from the stamp tax under Articles 34(r) and 35(r).

Second. We reach the same conclusion as to the transfer of securities to which the state bank held legal title in trust in various fiduciary capacities. The intent to tax such transfers must be clear and unmistakable. No such intent is apparent here. Under Section 3 of the National Banking Act, these securities passed to respondent "wholly by operation of law" just as did the securities previously discussed. Articles 34(r) and 35(r) make no distinction between transfers of stocks from a fiduciary and transfers from one who is also the beneficial owner. The exemption therein contained is therefore applicable.[9]

Third. The transfer of the real property owned by the state bank is likewise, in our opinion, exempt from the stamp tax.

Section 800, Schedule A-8, of the Revenue Act of 1926, as amended,[10] places a stamp tax on "Conveyances: Deed, instrument, or writing, delivered . . . whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers . . . " It is clear, however, from Section 3 of the National Banking Act that the state bank's realty was not conveyed to or vested in respondent by means of any deed, instrument or writing. There was a complete absence of any of the formal instruments or writings upon which the stamp tax is laid. Nor can the realty be said to have been "sold" or vested in a "purchaser or purchasers" within the ordinary meanings of those terms. Only by straining the realities of the statutory consolidation process can respondent be said to have "bought" or "purchased" the real property. That we are unable to do.

The judgment of the court below is therefore

Affirmed.

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[9] Because of the clear applicability of Articles 34(r) and 35(r), we have no occasion to determine the applicability here of Article 35(h), which exempts from the stamp tax "the transfer of stock from the name of a deceased or resigned trustee to the name of a substituted trustee appointed in accordance with the terms of the original trust agreement, which is a transfer resulting wholly by operation of law."

[10] C. 27, 44 Stat. 9, as added by Section 25 of the Revenue Act of 1932, and as amended by Section 212 of the National Industrial Recovery Act, and as amended by Pub. Res. No. 36, c. 333, 49 Stat. 431.